New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading)

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–526–90
ABDUL HAMID OMAR LP, JEMURI SERJAN CJ (BORNEO) AND LC VOHRAH J
7 DECEMBER 1991

Civil Procedure *— Interest — Judgment for payment of interest — Whether judge bound to order payment of interest for period from date of accrual of cause of action up to date of judgment — Rules of the High Court 1980 O 42 r 12*

Civil Procedure *— Appeal — Discretion vested by law in trial judge — Function of appellate court — Circumstances in which appellate court will review decision of trial judge*

Contract *— Limitation — Contractual term — Action must be commenced within a period of 12 months from date of accrual of cause of action — Relevant limitation period being six years — Whether term valid — Contracts Act 1950 s 29 — Limitation Act 1953 s 6(1)a*

Insurance *— Fire policy — Term that policyholder obtain licence for his business — At time policy was issued no law in force requiring such licence to be obtained — Law coming into force subsequently — Term not brought to attention of policyholder — Policyholder not holding licence — Whether term void ab initio*

By a fire insurance policy dated 3 June 1980 the appellant agreed to indemnify the respondent against loss and damage occasioned by fire to the property situated at the respondent's premises. The policy was initially valid for the period from 21 May 1980 to 1 May 1981 and was then renewed from 1 May 1981 to 21 May 1982. There was a stipulation in the policy that the respondent undertook during the currency of the policy to hold a licence as required by the municipal council and to comply with its conditions and requirements. When the policy came into effect there was no municipal by-law requiring the respondent's business to be licensed. Later certain municipal by-laws came into force with effect from 1 January 1981 the effect of which, inter alia, was to require the respondent's business to be licensed. The provision regarding the licence was not brought to the attention of the respondent at the time of the renewal of the policy. On 29 November 1981 during the renewed term a fire occurred on the premises in consequence of which the respondent submitted a claim to the appellant. The claim was rejected. The respondent filed a suit for the money claimed 17 months after the fire and after the expiry of the stipulated 12-month period within which a suit may be brought as contained in a condition of the policy. At the trial, among the defences raised were: (1) that the claim was barred by reason of the commencement of the action after the expiry of the 12-month period stipulated in the policy; and (2) that, in not obtaining the licence, the respondent had acted in breach of the condition regarding the licence.

The trial judge gave judgment in favour of the respondent for the agreed sum with costs without making any order for interest to be paid on the sum. The trial judge had held that the condition as regards the licence was void ab initio and severable from the rest of the terms of the policy on the ground, inter alia, that at the time that the policy was issued there was no legal requirement for the respondent to obtain a licence and hence the condition was impossible of fulfilment ab initio.

The appellant appealed to the Supreme Court against the decision. The respondent cross-appealed on the ground that interest at the rate of 4% pa should have been awarded on the agreed sum from the date of the fire to the date of judgment.

Held, dismissing the appeal and the cross appeal:

(1) The condition that the action be commenced within a 12-month period from the date of the occurrence of the loss or damage was void by virtue of the imperative words of s 29 of the Contracts Act 1950 as it clearly limited the time within which the respondent could enforce his right under s 6(1)(a) of the Limitation Act 1953.

(2) It was obvious on the facts that the procurement of a licence was never within the contemplation of the parties as it was incapable of implementation because no such requirement existed. The respondent therefore could not be said to be bound by the licensing stipulation of which he was not aware and which in any event at the material time was impossible of performance.

(3) By virtue of O 42 r 12 of the Rules of the High Court 1980, interest at the rate of 8% pa will have to be paid on the judgment sum from the date of judgment until the date of satisfaction there being no direction from the learned judge that a lower rate be used. As regards interest for any period before the date of judgment, the learned judge could, if he thought fit, have exercised his power to award interest to the respondent for having been kept out of the moneys due to him by way of indemnity under the policy.

(4) However, it is settled law that an appeal will not be entertained from an order which it was within the discretion of the judge to make unless it was shown that he had exercised his discretion under a mistake of law. Therefore, in accordance with the general rule that where discretion is given to a judge the appellate court ought not to review his decision unless he has declined to exercise his discretion or has manifestly proceeded on a wrong ground, no order ought to be made for interest to be paid on the agreed quantum.

[Bahasa Malaysia summary

Melalui satu polisi insuran kebakaran bertarikh 3 Jun 1980 perayu bersetuju menanggung rugi penentang terhadap kerugian dan ke-

rosakkan yang disebabkan oleh kebakaran kepada harta yang terletak di tanah penentang. Polisi itu pada mulanya sah bagi tempoh dari 21 Mei 1980 sehingga 1 Mei 1981 dan kemudiannya dibaharui dari 1 Mei 1981 sehingga 21 Mei 1982. Terdapat satu peruntukan di dalam polisi itu bahawa penentang menjamin bahawa semasa tempoh polisi itu ia akan memegang lesen seperti yang dikehendaki oleh majlis munisipal dan mematuhi syarat dan kehendaknya. Apabila polisi itu mula berkuat-kuasa tidak terdapat undang-undang kecil munisipal yang memerlukan perniagaan penetang dilesenkan. Kemudiannya beberapa undang-undang kecil munisipal berkuat-kuasa mulai daripada 1 Januari 1981. Kesannya, antara lain, ialah perniagaan penentang diwajibkan memperolehi lesen. Peruntukan berkenaan dengan lesen itu tidak dibawa ke perhatian penentang pada masa pembaharuan polisi itu. Pada 29 November 1981, semasa tempoh yang dibaharui itu satu kebakaran berlaku di harta itu dan berikutan dengan itu penentang telah membuat tuntutan kepada perayu. Tuntutan itu telah ditolak. Penentang memfail satu guaman untuk wang yang dituntut 17 bulan selepas kebakaran itu dan selepas tamatnya tempoh 12 bulan yang diperuntukkan dalam mana satu guaman boleh dibuat seperti yang terkandung di dalam satu syarat polisi itu. Di perbicaraan, antara pembelaan yang ditimbulkan adalah: (1) bahawa tuntutan itu dihalang akibat tindakan itu dimulakan selepas tamatnya tempoh 12 bulan yang diperuntukkan di dalam polisi itu; dan (2) bahawa, dengan tidak memperolehi satu lesen, penentang telah mengingkari syarat berkenaan lesen itu.

Hakim perbicaraan telah memberi penghakiman kepada penentang bagi jumlah yang dipersetujui bersama kos tanpa membuat sebarang perintah untuk bunga dibayar ke atas jumlah itu. Hakim yang arif telah memutuskan bahawa syarat tentang lesen itu adalah terbatal dari mula lagi dan boleh dipenggal daripada terma-terma lain polisi itu atas alasan, antara lainnya, bahawa pada masa polisi itu dikeluarkan tidak ada keperluan di sisi undang-undang bahawa penentang harus memperolehi satu lesen dan oleh itu pelaksanaan syarat itu adalah mustahil dari mula lagi.

Perayu telah merayu kepada Mahkamah Agung terhadap keputusan itu. Penentang telah membuat rayuan-balas atas alasan bahawa bunga pada kadar 4% setahun harus diberikan di atas jumlah yang dipersetujui dari tarikh kebakaran sehingga tarikh penghakiman.

Diputuskan, menolak rayuan dan rayuan-balas itu:

(1) Syarat bahawa tindakan dimulakan dalam tempoh 12 bulan dari tarikh kejadian kerugian atau kerosakan adalah terbatal akibat perkataan mustahak (imperative words) s 29 Akta Kontrak 1950 kerana ia jelasnya menghadkan masa dalam mana penentang boleh melaksanakan haknya di bawah s 6(1)(a) Akta Had Masa 1953.

(2) Adalah jelas mengikut fakta bahawa pemerolehan lesen itu tidak langsung berada di dalam jangkaan pihak-pihak itu kerana ia tidak boleh dilaksanakan memandangkan tiada peruntukan se-

demikian wujud. Penentang lantaran itu tidak boleh dikatakan diikat oleh peruntukan perlesenan yang tidak disedarinya dan yang apa sekali pun pada masa yang penting mustahil dilaksanakan.

(3) Memandangkan A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980, bunga pada kadar 8% setahun mesti dibayar atas jumlah penghakiman dari tarikh penghakiman sehingga tarikh penjelasan jika tidak ada arahan dari hakim bahawa satu kadar yang lebih rendah harus digunakan. Berkenaan dengan bunga untuk sebarang tempoh sebelum tarikh penghakiman, hakim yang arif boleh, jika difikirkannya patut, menjalankan kuasanya memberikan bunga kepada penentang kerana dihalang daripada menerima wang yang kena dibayar kepada penentang menurut tanggung rugi di bawah polisi itu.

(4) Walau bagaimanapun, adalah menjadi undang-undang yang tentu bahawa satu rayuan tidak akan dilayani daripada satu perintah yang boleh dibuat oleh hakim di dalam budi bicaranya melainkan jika ditunjukkan bahawa hakim telah menjalankan budi bicaranya mengikut kesilapan undang-undang. Jadi, mengikut aturan am bahawa apabila budi bicara diberikan kepada seorang hakim mahkamah rayuan tidak patut mengkaji semula keputusan beliau melainkan beliau telah enggan menjalankan budi bicaranya atau telah bertindak dengan jelas mengikut alasan yang salah, tiada perintah patut dibuat supaya bunga dibayar atas jumlah yang telah dipersetujui itu.]

Notes

For cases on interest on judgment debt, see 2 *Mallal's Digest* (4th Ed) paras 1166–1172.

For cases on appeal against discretion exercised by trial judge, see 2 *Mallal's Digest* (4th Ed) paras 221–231.

For cases on contract of insurance, see 3 *Mallal's Digest* (4th Ed) paras 1256–1257.

Cases referred to

1 *Corporation Royal Exchange v Teck Guan* (1912) 3 FMSLR 92 (folld)

2 *Hirabhai Narotamdas v Manufacturers Life Insurance Co* (1912) 14 Bom LR 741 (not folld)

3 *Baroda Spinning & Weaving Co Ltd v Satyanarayan Marine & Fire Insurance Co Ltd* 1914 AIR Bom 225 (not folld)

4 *Girdharilal Honuman Bux v Eagle Star and British Dominions Insurance Co Ltd* 1924 AIR Cal 186 (not folld)

5 *G Rainey & Anor v Burma Fire and Marine Insurance Co Ltd* 1926 AIR Rangoon 3 (not folld)

6 *AN Ghose v Reliance Insurance Co & Anor* 1924 AIR Rangoon 15 (not folld)

7 *Ruby General Insurance Co Ltd v Bharat Bank Ltd & Ors* 1950 AIR (37) (East) Punjab 352 (not folld)

8 *Pearl Insurance Co v Atma Ram* 1960 AIR Punjab 236 (not folld)

A 9 *Ma Ywet v China Mutual Life Assurance Co Ltd* 11 IC 756 (folld)
10 *Saroj Badhu Bhaduri v Sm Jnanada Sundari* 36 Cal WN 555 (folld)
11 *Nathu Mal Ram Das v BD Ram Sarup & Co* 135 IC 778 (folld)
12 *Jawahar Lal v Mathura Prasad & Anor* 1934 AIR All 661 (folld)
13 *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 (folld)
B 14 *Chop Eng Thye v Malaysia National Insurance Sdn Bhd* [1977] 1 MLJ 161 (overd)
15 *Murugesan v Krishnasamy & Anor* [1958] MLJ 92 (folld)
16 *Lim Kar Bee v Abdul Latif bin Ismail* [1978] 1 MLJ 109 (folld)
17 *Evans v Bartlam* [1937] AC 473 (folld)

C

Legislation referred to

Civil Law Act 1956 s 11
Contracts Act 1950 s 29
Limitation Act 1953 s 6(1)(a)
D Licensing of Trades, Businesses and Industries (Ipoh Municipal Council) By-Laws 1981
Rules of the High Court 1980 O 4 r 12
Contract Act 1872 [Ind] s 28

EC Khoo (*DC Alfred* with him) (*Sangara & DC Alfred*) for the appellant.
E *G Sri Ram* (*CS Kumar* with him) (*Hamid Tung & Kumar*) for the respondent.

Cur Adv Vult

F **LC Vohrah J** (delivering the judgment of the court): The facts which give rise to the present appeal and cross-appeal may be briefly stated. The respondent was the sole proprietor of Syarikat Federal Motor Trading which carried on the business of selling motor spare parts and accessories at No 31 Lahat Road, Ipoh ('the premises'). By a Fire Insurance Policy No 1109006 dated 3 June 1980 ('the fire policy') in consideration of premiums
G paid by the respondent the appellant agreed to indemnify the respondent against loss and damage occasioned by fire to the property situated in the premises. The fire policy was initially valid for the period 21 May 1980 to 21 May 1981 and was subsequently renewed by means of Renewal Certificate No R 0721 for the period 21 May 1981 to 21 May 1982 ('the renewed term'). When the fire policy came into effect on 21 May 1980 there was no
H municipal by-law requiring the respondent's business to be licensed. By gazette notification Pk PU5 published on 4 February 1981 the Licensing of Trades, Businesses and Industries (Ipoh Municipal Council) By-Laws 1981 ('the By-Laws') came into effect from 1 January 1981. By means of a typewritten slip entitled 'Licence Warranty No 9A' which was attached to the
I fire policy there was a stipulation that the respondent undertook during the currency of the policy to hold a licence as required by the municipal council and to comply with its conditions and requirements. On 29 November 1981 during the renewed term a fire occurred on the premises in consequence of which the respondent submitted a claim to the appellant. The

claim was rejected and the respondent filed a suit for contractual indemnity in respect of the loss of his goods at the premises as a result of the fire. The suit was filed 17 months after the fire and after the expiry of the stipulated 12-month period within which a suit could be brought contained in condition 19 of the fire policy but well within the six years provided by the Limitation Act 1953. At the trial quantum was agreed between the parties at $101,946.80 subject to liability being proved. Three defences were pursued at the trial by the appellant as follows:

(a) that the respondent's claim was barred by condition 19 of the fire policy;
(b) that there was a breach of warranty 9A of the fire policy relating to licence; and
(c) that the respondent had submitted a fraudulently exaggerated claim.

The learned judge Peh Swee Chin J at the trial found against the appellant on all its three defences and gave judgment in favour of the respondent for the agreed sum with costs without making any order for interest to be paid on the agreed quantum.

In the present appeal the appellant appears to have abandoned the defence grounded on fraud but the first two defences mentioned above have re-emerged as its substantive grounds of appeal. In the cross-appeal two grounds have been put forward by the respondent, namely:

(a) that warranty 9A of the fire policy should have been found by the learned judge to be merely a collateral undertaking; and
(b) that interest at the rate of 4% pa should have been awarded on the agreed quantum of $101,946.80 from the date of the fire to the date of judgment.

These grounds arising from the appeal and cross-appeal can conveniently be framed as issues under three heads as follows:

(A) Whether condition 19 of the fire policy contravenes s 29 of the Contracts Act 1950.
(B) Whether warranty 9A of the fire policy is a warranty which is void ab initio and capable of severance from the rest of the fire policy and, if not, whether it is a mere collateral undertaking.
(C) Whether interest ought to be payable on the agreed quantum of $101,946.80 at the rate of 4% pa from the date of loss to the date of judgment.

These issues now fall to be considered on the basis of the written outlines and oral arguments which have been presented to us.

A *Whether condition 19 of the fire policy contravenes s 29 of the Contracts Act 1950*

It was argued before the learned judge on behalf of the appellant that since the respondent's action was filed 12 months after the fire the respondent's claim was barred by condition 19 in the following words:

> In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

The learned judge found that this condition was rendered void by the provisions of s 29 of the Contracts Act 1950 in the following terms:

> Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

It would appear that the learned judge so found because the effect of condition 19 would be to deprive the respondent of his statutory right to bring an action under s 6(1)(a) of the Limitation Act 1953 as follows:

> Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
>
> (a) actions founded on a contract or on tort ...

The learned judge did so on the authority of what he believed to be the judgment of the Court of Appeal in the then Federated Malay States in *Corporation Royal Exchange v Teck Guan*.[1] In that case the plaintiff's shop, insured with the defendant company, was burnt down on 25 November 1911 and the shop and its contents were totally destroyed. On 8 December the plaintiff furnished the defendant company with particulars of his claim. On 5 January 1912 the defendant company repudiated liability. The plaintiff filed his suit on 6 May 1912. Condition 13 of the insurance policy was worded:

> If the claim be made and rejected and an action or suit be not commenced within three months after such rejection, all benefit under this policy shall be forfeited.

It was held by Sercombe-Smith CJC that the clause was void under s 28 of the Contract Enactment which was word for word the same as s 29 of the Contracts Act 1950. He had this to say (at p 96):

> Now, art 95 in the Second Schedule to the Limitation Enactment 1896 allows six years from the time when a contract is broken within which a suit for compensation for the breach of such a contract will lie.
>
> It seems clear to me that the effect of condition 13 is to cut down the period within which an assured may bring a suit for compensation for breach of a written contract to a period less than that sanctioned by the Limitation Enactment 1896. This being so, the condition is rendered void to that extent by s 28 of the Contract Enactment already cited, ie it is rendered destitute of legal effect.

The judgment of Sercombe-Smith CJC went on appeal and has been reported in such a manner that it can easily be mistaken for the judgment of the appellate court. Counsel for the appellant has therefore argued that since the judgment of Sercombe-Smith CJC in the *Corporation Royal Exchange* case[1] was only a judgment of the court of first instance (as the oral judgments of Woodward and Innes JJC dismissing the appeal were not reported) and since the learned judge had misapprehended that it was a

judgment of the then Court of Appeal, he would have come to a different decision on the point had his attention also been drawn specifically to seven cases in the Indian reports dealing with similar provisions in insurance policies and the identical provisions of s 28 of the Indian Contract Act 1872. The first of these cases cited by counsel is *Hirabhai Narotamdas v Manufacturers Life Insurance Co.*[2] There it was held that the terms used in an insurance contract must be interpreted with reference to the object and exigencies of insurance and that a clause in an insurance policy similar to condition 19 did not contravene the provisions of s 28 of the Indian Contract Act. The second case is *Baroda Spinning & Weaving Co Ltd v Satyanarayan Marine & Fire Insurance Co Ltd*,[3] where one of the conditions in a fire insurance policy sued upon by the plaintiff was that 'if the claim be made and rejected, and an action or suit be not commenced within three months after such rejection, all benefit under this policy shall be forfeited'. It was held that the condition of forfeiture was not within the scope of s 28 of the Indian Contract Act and hence a suit commenced more than three months after the rejection of the claim under the policy was not maintainable. The third case referred to is *Girdharilal Honuman Bux v Eagle Star and British Dominions Insurance Co Ltd*,[4] where the plaintiff insured with the defendant company under two policies. The insurances were effected subject to the terms and conditions endorsed or otherwise expressed in the policies. Both policies contained a condition which provided that 'if the claim be made and rejected and an action or suit be not commenced within three months after such rejection ... all benefit under this policy shall be forfeited'. It was held that the condition in the policies did not infringe s 28 of the Indian Act and that if it did not infringe s 28 the suit was maintainable. The fourth case is *G Rainey & Anor v Burma Fire and Marine Insurance Co Ltd*,[5] where a condition contained in a policy of insurance provided that 'if a claim be made and rejected, and an action or suit be not commenced within three months after such rejection ... all benefit under the policy shall be forfeited'. It was held that the condition did not infringe s 28 of the Indian Contract Act. The fifth case is *AN Ghose v Reliance Insurance Co & Anor*,[6] where one of the conditions in a fire insurance policy was that the insurance company should not be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim was the subject of pending action or arbitration. The suit by the policy holder was filed more than 12 months after the fire and there had been no reference to arbitration. The insurance company resisted the claim and it was contended that the condition was in contravention of s 28 of the Indian Contract Act and that it was opposed to public policy. It was held that the condition did not defeat any provision of law, that it was not opposed to public policy. It was held that the condition did not defeat any provision of law, that it was not opposed to public policy and that it did not contravene s 28 of the Contract Act. The sixth case is *Ruby General Insurance Co Ltd v Bharat Bank Ltd & Ors*,[7] where a condition in a fire insurance policy provided that 'in no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration'. It was held that the limitation placed by the terms of

a policy during which a claim can be made or after which the liability of the insurer would cease was not a condition void under s 28 of the Indian Contract Act. The seventh and last case cited by counsel in support of his contention that a condition similar to condition 19 does not infringe s 29 of the Contracts Act 1950 is *Pearl Insurance Co v Atma Ram.*[8] In that case a condition in an insurance policy stipulated: 'In no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration'. It was contended that the condition was void in view of s 28 of the Indian Contract Act. It was held that as the condition did not limit the time within which the insured could enforce his rights and only limited the time during which the contract would remain alive it did not contravene s 28 of the Indian Contract Act. This was a decision of the full bench which had reviewed, inter alia, all of the above six cases referred to and AN Grover J had this to say (at p 240):

> As a result of the above discussion, on principle and authority the validity of a clause similar to cl 19 must be upheld principally on following grounds:
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> (1) The primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts into which the parties have an unfettered right to enter provided that they are not opposed to public policy or are not hit by any provision of the law of the land.
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> (2) The object and exigencies of insurance are such that promptitude in asserting or enforcing a claim and also in its settlement was of the essence. The insurance companies would thus be justified in putting a time limit within which the claim must be enforced: otherwise all rights under the policy would come to an end.
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> (3) A clause of this nature does not provide a different period of limitation from the one prescribed by the Indian Limitation Act. Notwithstanding the existence of the clause, it is open to the insured to maintain an action within three years as prescribed by the Limitation Act subject to the company waiving the clause although under the Limitation Act the suit must be dismissed if instituted after the expiry of the prescribed period and the waiver is wholly ineffective.
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> (4) A contract may contain within itself the elements of its own discharge express or implied for its determination in certain circumstances.
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> (5) *As the clause does not limit the time within which the insured could enforce his rights and only limits the time during which the contract will remain alive it is not hit by the provisions of s 28 of the Contract Act.* (Emphasis added.)

Counsel for the respondent has challenged the reasoning behind each of the above grounds with persuasive arguments but we need only say at this stage that grounds (1) to (4) can only be sustained if recognition is first given to the distinction between rights and remedies implicit in ground (5), a distinction which has been explained in the *Baroda Spinning* case[3] by Batchelor J as follows:

> As I understand the matter, what the plaintiff was forbidden to do was to limit the time within which he has to enforce his rights: what he has done is to limit the time within which he is to have any rights to enforce; and that appears to me to be a very different thing.

Counsel for the respondent, on the other hand, had referred to four other authorities in the Indian reports wherein restrictive conditions similar in nature to condition 19 of the fire policy have been found to be void. The first is *Ma Ywet v China Mutual Life Assurance Co Ltd*,[9] where it was held on revision that a condition in a life insurance policy saying that no suit 'to recover under this policy shall be brought after one year from the death of the assured' was void under s 28 of the Indian Contract Act. The second case is *Saroj Bandhu Bhaduri v Sm Jnanada Sundari*,[10] where, in a transaction in the nature of a gift or grant which was construed by the court to be an agreement, a condition which limited the time for the enforcement of the right was held to be void under s 28 of the Indian Contract Act. The third case *Nathu Mal Ram Das v BD Ram Sarup & Co*,[11] which concerned a non-insurance contract the facts of which are not relevant, decided, inter alia, that a claim could not be time-barred under an indent which provided that no claim or dispute of any sort whatever could be recognized if not made in writing within 60 days from due date of payment as such a clause in a contract could not take away the statutory right of a plaintiff to bring his claim within the time prescribed by law. The fourth case *Jawahar Lal v Mathura Prasad & Anor*,[12] another non-insurance case, came before the full bench when the provisions of s 28 of the Indian Contract Act, inter alia, were considered in the light of a creditor's right to sue on an instalment bond. The facts of the case are not really relevant but the following observation of King J (at p 675) is highly significant:

> Parties cannot by contract alter the statutory period of limitation. Nor can they alter the statutory starting point of limitation. Such a contract will be void.

It would appear from the authorities submitted by counsel for both parties that the preponderant view of the Indian courts is that conditions similar to condition 19 of the fire policy do not infringe or contravene s 28 of the Indian Contract Act, the provisions of which, as mentioned, are identical to those of s 29 of our Contracts Act 1950. It would appear that the validity of a condition similar to condition 19 of the fire policy has been upheld in the Indian cases called in aid by counsel for the appellant principally on the distinction that has been made between rights on the one hand and remedies on the other clearly implied in ground (5) of the passage quoted above from the judgment of AN Grover J in the *Pearl Insurance Co* case.[8]

This distinction between the existence of a right and its enforcement as a matter of law does not however appear to exist in our jurisprudence as can be seen in the judgment of this court in *Hock Hua Bank Bhd v Leong Yew Chin*.[13] In that case the respondent had caused a writ accompanied by a statement of claim to be issued against the appellant bank on 8 October 1990. On 3 December 1984 the respondent made an application for amendment of the statement of claim to introduce a new cause of action. The proposed amendment amounted to the contention that the refusal to credit the amounts debited to the respondent's account with the appellant bank amounted to a conversion of the amounts, alternatively the amounts so debited were payable to the respondent as moneys had and received by the appellant bank to the respondent's use. The senior assistant registrar dismissed the application but on appeal it was allowed by the learned judge

of the High Court. The appellant bank then appealed to the Supreme Court. It was common ground that the application to amend was made after the expiry of the period of limitation current at the date of the issue of the writ. It was also common ground that the proposed amendment raised a new cause of action adding a substantially new relief. It was however not in dispute that the new cause of action arose out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed. It was held (by a majority) that the court has power to grant an amendment after the expiry of the limitation period notwithstanding that the effect of the amendment will be to add or substitute a new cause of action, subject to the very important condition, namely, that the new cause of action must arise out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed. This judgment is particularly important for the views expressed by the Supreme Court on the nature of a remedy in relation to the cause of action which, in our view, is nothing more than the right to sue. Abdul Hamid Ag LP (as he then was) had this to say (at p 232):

> A new or substantially new relief which arises out of a new cause of action is *in effect ancillary to the new cause of action and is indeed part and parcel of that new cause of action.*
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> ...
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> In this regard it may be pertinent to refer to the definition of the words 'cause of action' expressed by Lord Justice Diplock in *Letang v Cooper* ([1965] 1 QB 232,242–3) as 'a fractual situation the existence of which entitled one person to obtain from the court a remedy against another'. The definition in my view fortifies the point I am making in that *a relief or a remedy is ancillary to and not separable from a cause of action.* (Emphasis added.)

In the same judgment Syed Agil Barakbah SJ had this to say (at p 236):

> Relief means a remedy sought by a plaintiff in an action. A cause of action is simply a factual situation the existence of which entitles a plaintiff to obtain from the court a remedy against the defendant. ... There must be a cause of action before a plaintiff can claim a relief in an action ... *Relief is part and parcel of a new cause of action and in fact ancillary to it.* (Emphasis added.)

It is clear therefore that the legal distinction that obtains in the relevant Indian decisions that have been referred to between a right and its remedy in the context of the consequences that flow therefrom does not exist in Malaysian law in the eyes of which the distinction is merely semantic. We do not think that a right can be dissociated from its remedy. We are therefore of the opinion that condition 19 of the fire policy contravenes s 29 of the Contracts Act 1950. The learned judge was therefore correct in holding that condition 19 of the fire policy is void by virtue of the imperative words of s 29 of the Contracts Act 1950 as it clearly limits the time within which the respondent can enforce his right under s 6(1)(a) of the Limitation Act 1953.

That really should dispose of the issue under consideration but we feel that a word ought to be said about a local case which we have come across, namely, *Chop Eng Thye v Malaysia National Insurance Sdn Bhd,*[14] where provisions identical to condition 19 called for judicial interpretation. In that

case the insured's smoke-house and all the goods therein were destroyed by fire on 6 April 1971. Ajaib Singh J (as he then was) found that there was no pending action or arbitration within 12 months of the happening of the loss or damage so that when the insured filed its action against the insurance company on 16 May 1972, the latter had ceased to be liable to the insured for any loss or damage. It is clear from the judgment that the attention of the learned judge had not been drawn to the relevant statutory provisions and authority, namely, s 29 of the Contracts Act 1950, s 6(1)(a) of the Limitation Act 1953 and the *Corporation Royal Exchange* case,[1] and we would therefore consider his judgment to have been given per incuriam.

B *Whether warranty 9A of the fire policy is a warranty which is void ab initio and capable of severance from the rest of the fire policy and, if not, whether it is a mere collateral undertaking*

The learned judge found on the evidence at the trial that warranty 9A was 'in effect a condition the breach of which would have entitled the insurer to repudiate the insurance contract and its liability under it'. He also found that it was impossible of fulfilment ab initio. Accordingly he held that it was a nullity and severable from the rest of the terms of the fire policy. Warranty 9A is worded:

> Warranted that during the currency of this policy the insured shall hold such licence or licences as is or are required by the Local Municipal or other authorities and shall fully comply with the conditions and requirements thereof at all times.

The reason for this finding has been explained very succinctly by the learned judge and because of its brevity is hereunder set down in full:

> In my opinion, possibly due to the indiscriminate use of the words of 'conditions' and 'warranties' in courts in days gone by, there has grown a very peculiar contradiction in terms between the [two] words in the law of contract. Generally, in the law of contract, a condition is a term of contract, the breach of which entitles the innocent party to repudiate the contract while a warranty is a term the breach of which only gives a right only to claim for damages. However, in the field of insurance law, the word 'warranty' has long since assumed an opposite meaning, ie it is a term which entitles the innocent party to repudiate the insurance contract. Just to mention a short passage from Lord Wright in the House of Lords in *Provincial Insurance Co v Morgan* [1933] AC 240, at p 253 where his Lordship said: 'On the other hand it is clear law that in insurance a warranty or condition (because these words are used as equivalent in insurance law, which in that respect differs in its use of the term from the law of sale of goods) ...'.
>
> The conclusion was that the warranty would have to be given the usual effect, ie the warranty 9A was in effect a condition the breach of which would have entitled the insurer to repudiate the insurance contract and its liability under it.

This conclusion is amply supported by forceful authority. Associate Professor Poh Chu Chai in his *Law of Insurance* (2nd Ed, 1990) has this to say (at p 193):

> The terms 'warranty' and 'condition' in the context of an insurance contract have acquired a meaning peculiar only to insurance law. For instance, under the

English Sale of Goods Act 1979, a stipulation in a contract of sale is a condition if the breach of which gives rise to a right to treat the contract as repudiated and a warranty is a term, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated. In insurance law, the terms are used with the opposite effect. In *De Hahn v Hartley* [(1786) 1 Term Rep 343 at pp 345 and 346], Lord Mansfield described a warranty as follows:

> A warranty in a policy of insurance is a condition or a contingency, and unless that can be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced, but, being inserted, the contract does not exist unless it be literally complied with.

As has been adverted to earlier, it is common ground that when the fire policy came into force on 21 May 1980 warranty 9A could not be fulfilled ab initio because no by-laws were then in force requiring the respondent's business to be licensed. The by-laws came into force only on 1 January 1981. The fire policy was renewed on 9 May 1981 for another year to take effect from 21 May 1981 by means of a renewal certificate. It was admitted at the trial by the branch manager of the appellant (DW3) that warranty 9A was 'redundant' at the commencement of the fire policy as the business was not required by law to be licensed. It is obvious from the evidence that the respondent was not literate in English. The agent of the appellant (PW1), who clinched the insurance contract, stated in his evidence that he was the one who filled up the proposal form which was in English on behalf of the respondent and that the respondent merely appended his signature which was in Chinese characters at the bottom of it. He stated further that the warranty 6A (relating to storage of hazardous goods) and warranty 9A stipulations now appearing in the proposal form, which constituted the basis of the contract between the parties, were not there when it was filled up by him and then signed by the respondent so that presumably they were insertions made whilst the form was in the custody of the appellant. It is obvious on these facts that the procurement of a licence was never within the contemplation of the parties as it was incapable of implementation because no such requirement existed. The respondent therefore could not be said to be bound by the licensing stipulation of which he was not aware and which in any event at the material time was impossible of performance. The learned judge was therefore correct in finding warranty 9A void ab initio.

Was the learned judge then correct when he proceeded to apply the doctrine of severance and so severed warranty 9A which was void ab initio from the rest of the terms of the fire policy? He explained:

> This policy in question contained distinct and separate promises on the part of the insured for the promise of indemnity of the insurer in case of fire. There was at least the promise to pay insurance premium the payment of which was never in question. Discarding the warranty 9A which was void ab initio, could the rest of the terms of policy between the insurer and the insured stand, and remain enforceable? My answer was affirmative.

He found support for that conclusion in the case of *Murugesan v Krishnasamy & Anor*.[15] In that case the defendants, husband and wife, were in occupa-

tion of lands under temporary occupation licences. They subsequently applied for EMR titles in respect of the lands. They then entered into agreements with the plaintiff which, inter alia, cited that they had applied for 'State land' and provided that for the considerations stated they agreed to execute valid transfers of the lands to the plaintiff as soon as titles were issued. The agreement further provided that in the meanwhile the plaintiff was to enter on the lands and enjoy the proceeds thereof. Subsequently the applications of the defendants for the EMR titles were rejected. The plaintiff thereupon claimed the return of the money paid by him as the contract had become impossible of performance. The defendants pleaded that as the agreements were attempts to sell and purchase rights under temporary occupation licences and were therefore unlawful they were void for illegality and 'the loss should fall where it lies'. The court found, inter alia, that the promise to allow the plaintiff to enter the lands was illegal as it was an attempt to transfer certain rights of the temporary occupation licences but that this illegal promise could be severed from the promise to transfer the titles when they were issued, the latter promise being good in law which would have entitled the plaintiff to sue for specific performance had the government approved the applications for the land titles. Thomson CJ had this to state (at pp 93 and 94):

> It is well settled law that if several distinct promises are made for one and the same lawful consideration and one or more of these promises is such as the law will not enforce that will not of itself prevent the rest from being enforceable. ...
>
> The latest discussion on the point is to be found in the case of *Bennett v Bennett* [(1952) 1 All ER 413, 421] where Denning LJ said:
>
> > 'If the void covenant goes only to part of the consideration, so that it can be ignored and yet leave the rest of the deed a reasonable arrangement between the parties, then the deed stands and can be enforced in every respect save in regard to the void covenant.'

In the light of the above statement, the learned judge's finding on this point on the facts of this case, in our view, cannot be impeached. Accordingly warranty 9A being void ab initio and incapable of performance is severable from the rest of the fire policy at its inception.

It was also argued on behalf of the appellant that when the fire policy was renewed it became a new contract of insurance and warranty 9A was capable of performance because by the time it was renewed and came into force on 21 May 1981 the by-laws had already come into force. We are of the view that as the learned judge correctly found that warranty 9A was void ab initio and as the evidence shows that this provision was never brought to the respondent's attention at the time of renewal he cannot be expected to have been aware of it and this argument cannot be sustained.

Although in the notice of cross-appeal the respondent has set out as his second ground that the learned judge should have construed warranty 9A as 'a collateral undertaking which did not have the force or the consequence of a warranty in the context of the law of insurance' this point was not pursued in argument by counsel for the respondent who in fact supported the learned judge's finding. The subsidiary issue as to warranty 9A being

characterized as a collateral undertaking therefore becomes superfluous and calls for no consideration.

Whether interest ought to be payable on the agreed quantum of $101,946.80 at the rate of 4% pa from the date of loss to the date of judgment

The learned judge in giving judgment for the agreed quantum of $101,946.80 with costs, as alluded to earlier, made no order for interest to be paid. There is no question that by virtue of O 42 r 12 of the Rules of the High Court 1980 interest at the rate of 8% pa will have to be paid on this judgment sum from the date of judgment until the date of satisfaction there being no direction from the learned judge that a lower rate be used. The question to be determined is whether the respondent is entitled as of right to interest for any period before the date of judgment.

From the record of appeal we see that interest was claimed in general terms in the statement of claim and also in the written submission tendered after the close of the trial by counsel for the respondent. No such claim however was made by the respondent himself at the trial when he gave his evidence. Neither counsel argued this question before us. There is however clear authority for the awarding of pre-trial interest in personal claims arising out of road accidents. The reason for awarding interest in insurance claims is explained by Professor Poh in his book in the following words (at p 546):

> When a claim is made under an insurance policy following a loss within the meaning of the policy, the insurer is under a duty to indemnify the insured. If the insurer delays payment or refuses to pay, the insured is entitled to claim interest for the period that he has been kept out of his money. The courts have a discretionary power to award interest in addition to the indemnity provided under the policy if the insurer is in breach of his duty to indemnify the insured. Interest is awarded in order to compensate the insured for being kept out of his money.

This power to award interest by our courts is embodied in s 11 of the Civil Law Act 1956 and judicial pronouncement has been made in relation to it in *Lim Kar Bee v Abdul Latif bin Ismail*[16] wherein Raja Azlan Shah FJ (as he then was) had this to say (at p 120):

> It was further argued that since quantum was agreed upon at date of trial interest on damages should be awarded from date of judgment and not, as the learned judge held, from date of service or writ. Counsel did not elaborate on it, and the matter was left there without it being fully argued before us.
>
> The power of the court to award interest on damages is contained in s 11 of the Civil Law Act (67 of 1956) (see also O 40 r 11 of the Supreme Court Rules). This section gives the court power, if it thinks fit, to order that there shall be included in the sum in which judgment is given interest at such rate as it thinks fit on the whole or any part of the damages for the *whole or any part of the period* [emphasis mine] between the date when the cause of action arose and the date of judgment. Therefore, in proceedings for the recovery of damages, the court generally exercises its power so as to include in that sum interest on those damages or on such part of them as it considers appropriate, unless it is satisfied that there are special reasons why no interest should be given. The basis of an

award of interest is that the defendant has kept the plaintiff out of his money and has had the use of it himself, so he ought to compensate the plaintiff accordingly. Section 11 of the Civil Law Act is, I think, modelled on the provisions of s 3(1) of the (UK) Law Reform (Miscellaneous Provisions) Act 1934, and those provisions have been judicially considered in a number of cases, where the courts have laid down certain guidelines (see, for example, *Jefford v Gee* [1970] 1 All ER 1202).

It is clear therefore that in the circumstances of this case the learned judge could, if he thought fit, have exercised his power to award interest to the respondent for having been kept out of the moneys due to him by way of indemnity under the fire policy. But by the cross-appeal we are in effect asked to rule that the learned judge was wrong not to have awarded interest on the agreed quantum. However, it is settled law that an appeal will not be entertained from an order which it was within the discretion of the judge to make unless it be shown that he exercised his discretion under a mistake of law: see *Evans v Bartlam*[17] at p 486. In the present case it is clear from his written judgment that the learned judge gave careful consideration to the written submissions made by counsel on behalf of both the parties. The question of interest was specially addressed by counsel for the respondent and it must be assumed that the learned judge exercised his discretion when he made no order for the payment of interest. Therefore, in accordance with the general rule that where discretion is given to a judge the appellate court ought not to review his decision unless he has declined to exercise his discretion or has manifestly proceeded on a wrong ground, we are of the view that no order ought to be made by us for interest to be payable on the agreed quantum.

In the light of our conclusions on the foregoing issues, we would dismiss the appeal with costs and also the cross-appeal with costs.

Appeal and cross-appeal dismissed.

Reported by PS Ranjan